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In The

Supreme Court of the United States

October Term, 1937

No. 32

IRON ROSS, as Receiver of the First National Bank of Perry, a corporation under the National Banking Laws,

Petitioner,

v.

W. V. KNOTT, as Treasurer of the State of Florida, W. V. KNOTT, Treasurer of the State of Florida, as ex officio County Treasurer of Taylor County, Florida, etc., et al.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I.
OPINIONS OF THE COURTS BELOW

The opinion and order of the District Court appear at pages 33 and 38 of the printed record, and are reported in 13 F. Supp. 963. The opinion of the Circuit Court of Appeals appears in the record at page 53, and is reported in 87 F. (2d) 817.

"NOTE: Any emphasis appearing in this brief is supplied."

II.

JURISDICTION

On May 24, 1937, this Court granted a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of that Court, in this case. (R. 67). The judgment of the Circuit Court of Appeals to be reviewed was entered January 22, 1937. (R. 57.)

III.

STATEMENT OF CASE

We prefer to restate the facts.

In the latter part of 1929 and the early part of 1930, and as shown in part by receipt dated May 2, 1930, appearing as Exhibit 3 to the bill of complaint (R. 19), assets of the First National Bank of Perry, Florida, were delivered to the Bond Trustees of Taylor County, Florida, as security for the safekeeping and prompt payment of public funds of the county. As shown by the receipt which was, by reference, made part of the bill of complaint (R. 7, 19), these assets were *conditionally* redelivered to the bank, to be by it held in trust and segregated. This collateral was "to be released to the bank only by and with the consent of said Board of Bond Trustees, their successors, or assigns, *so long as said funds remain on deposit*" (R. 19). Upon the passage of Chapter 14486, Laws of Florida, Acts of 1929, which created a State Board of Administration to administer the interest and sinking funds of county road and bridge bonded indebtedness and supplementary revenues made available by law, the Bond Trustees, acting pursuant to Section 3 of said act, assigned the collateral to W. V. Knott, State Treasurer, as County Treasurer ex-officio.

On March 12, and March 15, 1930, respectively, other collateral was delivered to the State Treasurer, as County Treasurer ex-officio, to secure any deposits (R. 5, 18) (R. 6, 18) made, or to be made, in said capacity. This collateral was continuously held by him.

In late October, 1930, the bank closed and Ross, the petitioner here, was appointed Receiver. He thereupon delivered some of the collateral so conditionally left with the bank, to said Knott; collected upon a portion of the remainder, remitting the proceeds thereof for application on unpaid balances of such deposits; and retained an uncollected portion, never questioning the terms of the receipt under which the collateral was held segregated and in trust by the bank.

More than five years after the bank closed, Ross, as Receiver, on December 11, 1935, at the direction of the Comptroller of the Currency, filed bill of complaint (R. 1-22), attacking in general the right of Respondents to assert any claim against the collateral as security for unpaid balances of public funds of Taylor County on hand with the bank when it closed. The prayer of the bill appears at pages 15 to 17 of the printed record.

Motions to dismiss the bill of complaint were separately filed by Taylor County (R. 22) and by the remaining Defendants (R. 24). Thereafter, by leave of Court and before hearing, additional grounds of their motion to dismiss, together with supplemental motions to dismiss parts of the bill, were filed by the last named Defendants (R. 26).

In an opinion rendered February 29, 1936 (R. 33) and reported in 13 F. Supp. 963, the District Judge held that the bill of complaint was without equity, since State

banks in Florida were at all times authorized to give such security; the agreements were continuing ones; any obstacle to giving effect to the intention of the parties was removed by the Act of June 25, 1930, amending the National Banking Act; from that day to the closing of the bank in late October, no attempt was made by the bank to reclaim the collateral, although the State law in effect required, and the Federal law then authorized, security to be given. Accordingly, it was held that the collateral stood as security for unpaid balances of such deposits remaining with the bank after the amendment and on hand when it closed. Consequently, decree was entered dismissing the bill (R. 38). The Receiver prosecuted his appeal to the Circuit Court of Appeals, which affirmed the decree of the lower Court, the opinion appearing at page 53, of the printed record, and being reported in 87 F. (2d), 817.

IV.

QUESTION PRESENTED

When a National Bank and persons having the custody of public funds of a Political subdivision of a State, by whose law State Banks could give such security, enter in good faith but prior to June 25, 1930, into continuing agreements pledging specific assets as security for the safekeeping and prompt payment of deposits of such funds, made or to be made; and such collateral is delivered to, and continuously retained by, such persons (or, after its delivery, is conditionally redelivered to, and held segregated and in trust by, the bank, to be released to the bank only by the consent of said persons, never given), and thereafter, upon the amendment of June 25, 1930, to the National Bank Act,

nothing is done by the bank to reclaim the securities so held (although the State Law in effect required, and the Federal Law then authorized, such security to be given); and, there being no suggestion that any security was given in contemplation of insolvency, the bank does not close until late October, 1930, whereupon its appointed receiver turns over to such persons (or remits, for application to their claim, collections from) such collateral so left segregated: Under such circumstances should the Circuit Court of Appeals be held in error for affirming the District Court's decree dismissing the bill of complaint brought by the Receiver December 11, 1935, for the rescission and cancellation of such pledge agreements; or were the two lower Courts correct in holding that the obstacle to giving effect to the intention of the parties, was removed by the Act of 1930, and that the collateral stands impressed with a lien to the extent of the unpaid balances of deposits remaining with the bank when it closed in late October, 1930.

The Respondents contend that the question should be answered in the affirmative, and the judgment of the Circuit Court of Appeals should be affirmed

V.

SUMMARY OF ARGUMENT

1. The cases dealing with the 1930 amendment of the National Banking Act support the rulings of the lower Courts.

2. State banks in Florida could at all times give security for deposits of such funds as are involved in the instant case.

3. The implications, if not the holding, of the *Lewis* case, strongly support, and are in harmony with, the rulings of the lower Courts.

4. The rulings of the lower Courts do equity between the parties, involve no infraction of the *ultra vires* rule, and should be sustained.

5. The relationship between the Respondents and the bank was a continuing one, with the intention implicit that the assets delivered stand as security for unpaid balances of deposits, so long as they should remain with the bank.

6. When the obstacle was removed by the amendment, the original agreement could, as to the future, be given the effect intended by the parties.

7. Independent of the original pledge agreement, the lien can be sustained on equitable principles.

8. The authorities cited by petitioner are neither persuasive not controlling in the instant case.

VI.

ARGUMENT

FIRST POINT

ANALYSIS OF THE CASES DEALING WITH THE 1930 AMENDMENT TO THE NATIONAL BANK ACT SHOWS THAT THEY ARE IN HARMONY WITH AND SUPPORT THE RULING OF THE LOWER COURT

A. Introductory:

In evaluating the decisions which have dealt with the amendment of June 25, 1930, to the National Bank Act, it is important to observe that that amendment provided:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located, in the case of other banking institutions in the state."

46 *Stat. at L.* 809, *U. S. C. Title* 12, *Sec.* 90.

Thus, it will be seen that, even after its passage, no change whatever was made in the existing law with reference to the authority of national banks to give security for private deposits; nor was there any change with reference to the authority of such banks to give security for deposits of public funds of states or their political subdivisions, except as to those banks located

in states by whose law state banks could give like security.

Furthermore, it is noteworthy for purposes of analysis that the Supreme Court of the United States has spoken but three times on the subject, the cases in the order of their decision, with dates of decision indicated being:

Texas & Pacific R. R. Co. v. Pottorff, (2-5-34), 291 U. S. 245, 78 L. Ed. 777, affirming 63 F. (2d) 1;

City of Marion v. Sneeden, (2-5-34), 291 U. S. 262, 78 L. Ed. 787, affirming 64 F. (2d) 721, which reversed 58 F. (2d) 341;

Lewis v. Fidelity & Deposit Co., (6-4-24), 292 U. S. 559, 78 L. Ed. 1425, affirming 67 F. (2d) 961.

It is, therefore, likewise to be borne in mind that any decisions of other courts antedating these are necessarily modified to the extent of any inconsistency with what was therein decided. This comment, of course, extends with equal force to any later inconsistent holdings.

Only one of the three cited cases, factually analyzed, concerned a situation in which there had been any change in the existing law as to the authority of the bank involved. In both the *Marion* case and the *Pottorff* case the type of action held originally to have been *ultra vires* remained so by reason of the fact that the amendment conferred no new authority. So it was that, if done anew after the amendment, such action would, in each of those cases, still have been *ultra vires* and beyond the scope of the authority granted the bank. It is hard-

ly surprising, therefore, to find the Court refusing to attach legal consequences of authorized corporate action to what had taken place, in view of the fact that the type of action complained of was, under the Court's interpretation, still *ultra vires* the corporation.

In the *Lewis* case, on the contrary, was involved a situation in which a change was wrought in the corporate authority, and therefore in the corporate charter, by the amendment; and, accordingly, we find the Court giving effect to the intention of the parties from the effective date of the amendment. It was not necessary to decide, and the Court reserved the question as to whether, by virtue of the amendment to the National Bank Act, there had been any lien prior to the effective date of the amendment. Indeed, the only situation readily apparent in which such a question could be involved in other than an academic way, would be in the event of insolvency of the bank supervening prior to the effective date of the amendment.

Any anlysis of the cases dealing with the amendment which fails to take in consideration the above stated matters is, we sumbit, faulty, and can serve only to confuse the real issue before the Court in this case.

Consequently, we group below into two general groups, decisions which have dealt with the amendment. The first group concerns those cases dealing with attempts to create liens where no new authority was conferred by the amendment; the second, with those where new authority was conferred. In discussing the cases in the first group, it should be borne in mind that it can readily be subdivided so as to show which cases involved attempted security for private deposits; and

which involved attempted security for deposits of public funds where, by state law, state institutions could not give like security. No further subdivision of the group seems necessary. In discussing the second group, it should be borne in mind that it can be subdivided with reference to the factual situation involved, as we indicate below.

B. Analysis shows that the cases readily fall into two groups: (1) those where the amendment conferred no new authority; and (2) those where new authority was conferred.

(1) *Cases of the first group considered:*

a. As we have pointed out, the cases of the first group may be subdivided into those where private deposits were involved; those where public deposits were involved, and into miscellaneous cases.

b. Cases of first group grouped and subdivided:

Cases involving private funds:

Smith v. B. & O. R. R. Co., (3-5-31), (D. C. W. D. Pa.), 48 F. (2d) 861;

B. & O. R. R. Co. v. Smith, (3-10-32), (C. C. A. 3), 56 F. (2d) 799;

Texas & P. R. R. Co. v. Pottorff, (2-5-34), 291 U. S. 245, 78 L. Ed. 777, affirming (C. C. A. 5) 63 F. (2d) 1;

Griffin v. Royall, (4-3-34), (C. C. A. 4), 70 F. (2d) 103;

Eckerson v. Utter, (5-30-34), (D. C. Idaho), 7 F. Supp. 201;

Spradlin v. Royal Mfg. Co., (11-19-34), (C. C. A. 4), 73 F. (2d) 776, reversing 6 F. Supp. 98;

Utter v. Eckerson, (6-17-35), (C. C. A. 9), 78 F. (2d) 307;

Harrell v. Lawhead, (1-9-36), (D. C. N. D. W. Va.), 13 F. Supp. 298;

Phelps v. Cit. Union Nat'l Bank, (2-13-36), (D. C. W. D. Ky.), 13 F. Supp. 623;

Calcasieu Nat'l Bank v. Bank of Abbeville & Trust Co., (5-2-36), (Reh. den. 6-5-36), (C. C. A. 5), 83 F. (2d) 742.

Cases involving public moneys:

City of Marion v. Sneeden, (2-5-34), 78 L. Ed. 787, 291 U. S. 262, affirming 64 F. (2d) 721, which reversed 58 F. (2d) 341;

Faircloth v. Atlantic City, (8-15-36), (D. C. N. D. N. J.), 16 F. Supp. 131.

Miscellaneous cases:

O'Connor v. Rhodes, (6-29-35), (Ct. of App. D. C.), 79 F. (2d) 146.

c. It is quite obvious that cases dealing with the matters treated in those of the first group are not pertinent in the situation before the Court, because at no time, in any of the cases cited under the first group, could any lawful effect be given to the intention of the parties to create liens either before or after the amendment to the National Bank Act. If the courts had given such effect to their intention, it is clear that, under the construc-

tion adopted, the courts would have been continuing an initial abuse of power and would have allowed the parties to do indirectly that which at no time could be done directly. We, therefore, submit that these cases have no bearing upon a situation in which, as in the case before the Court, it was within the authority of national banks after June 25, 1930, to give security for deposits of public funds of states or their political subdivisions. Even in this situation, however, it is interesting to note that in some of the cases the court expressed reluctance, where public funds were involved, in being forced to overturn what had been approved by the Comptroller of the Currency over a long period of years. The only case in the above group requiring special notice at this point is the case of *O'Connor v. Rhodes*, (6-29-35), (Ct. of App. D. C.), 79 F. (2d) 146. It will be observed that that case did not involve public funds of states or their political subdivisions; but in part it did involve a situation in which security was authorized to be given. To that extent, the Court held the attempt to give security valid.

(2) *Cases of the second group considered*:

a. Introductory:

It is apparent that cases in the second group above referred to; that is, those cases in which a change was wrought in the corporate authority by the amendment of June 25, 1930, are capable of further subdivision and classification on the basis of the facts involved. Thus it is possible to divide them into those cases in which insolvency supervened prior to June 25, 1930, and those where insolvency did not occur until after the amendment. Further subdivision of the two sub-classes men-

tioned might be made with respect to the time of deposits; that is, as to whether the deposits were made prior to June 25, or after June 25, 1930; or, even further, as to whether the case involved unpaid balances of deposits remaining with the bank after June 25th.

b. Cases of second group as subdivided:

Cases where insolvency supervened prior to June 25, 1930:

Mays v. Board of County Commissioners Creek County (5-16-33), (Reh. den. 7-12-33), (Okla.), 23 Pac. (2d) 664;

Mays v. Wilkinson, (10-18-35), (D. C. Okla.), 12, F. Supp. 350, (apparently decided without reference to the *Lewis* case);

Ross v. Lee, (8-14-36), (D. C. S. D. Fla.), 15 F. Supp. 972.

Cases where insolvency followed the effective date of the amendment:

F. & D. Co. v. Kokrda, (8-12-33), (C. C. A. 10), 66 F. (2d) 641;

Haynes v. City of Woodward, (2-19-34), (D. C. W. D. Okla.), 6 F. Supp. 270;

Lewis v. Fidelity & Deposit Co., (6-4-34), 292 U. S. 559, 78 L. Ed. 1425, 92 A. L. R. 794, affirming 67 F. (2d) 961;

Collins v. School Dist. of Borough of Trafford, (7-16-34), (C. C. A. 3), 72 F. (2d), 339;

Kavanaugh v. Fash, (12-26-34), (C. C. A. 10), 74 F. (2d) 435;

Hellawell v. Town of Hempstead, (2-5-35), (D. C. E. D. N. Y.), 10 F. Supp. 771;

Standard Investment Co. v. Town of Snow Hill, (6-3-35), (C. C. A. 4), 78 F. (2d) 33;

Ross v. Knott, (2-29-36), (D. C. N. D. Fla.), 13 F. Supp. 963, affirmed 87 Fed. (2d) 817.

c. The first three cases of the second group have no direct application, because insolvency occurred prior to June 25, 1930, and the rights of the parties had become fixed before the amendment. The distinction between those cases and instant case is apparent for, in order to give effect to the intention of the parties, it would have been necessary for the Court to have enforced the lien as of the date of the insolvency of the bank, which insolvency preceded the passage of the amendment conferring powers. We do not concede that the amendment in question was not intended to be curative, so far as any attempts to assert liens where the rights of the depositors had become fixed before the amendment is concerned; but even if this were conceded, it is clear that the difference between that case and the one at bar is marked, for in the instant case, in order to sustain the holdings of the District Court and the Circuit Court of Appeals, it is not necessary at all to give any retroactive effect to the intention of the parties, and the rights of the depositors did not become fixed until long after the passage of the amendment.

d. Several cases in which insolvency followed the effective date of the amendment require specific notice at this point.

In *Lewis v. Fidelity & Deposit Co., supra,* 292 U. S. 559, 78 L. Ed. 1425, 92 A. L. R. 794, affirming 67 F.

(2d) 961, which in all of its implications, in our opinion, supports the holdings of the lower Courts in the instant case, the national bank had qualified as a public depositary under Georgia law, which required bond in double the amount of the deposits. The Fidelity Company was surety on the only bond which was ever executed, and that was in 1928. Georgia law provided that, upon the giving of such bond, a general lien should arise on all of the assets of the bank, whether presently held or subsequently acquired. Pursuant to the appointment deposits were made; and when the amendment of June 25, 1930, was enacted, a balance was on hand with the bank, due the depositor. This balance, it is true, was withdrawn, and it is also true that subsequent deposits were regularly made and aggregated a large sum between the date of the amendment and the appointment of the receiver in 1932. When the bank failed in 1932, the Fidelity Company paid the unpaid balance as of the time of the closing, and took an assignment of the depositor's rights against the bank. The Supreme Court held that, though the bond when originally given, was ineffective to create a lien; yet any obstacle to the creation of the lien was removed by the amendment of June 25, 1930, and the original agreement of the parties could, as to the future, be given the effect intended by them. It was held also that this lien was effective to protect deposits made after June 25, 1930. Consequently the Court allowed the Fidelity Company to assert a lien as against the *general* assets of the bank in the hands of the receiver. Since all of the deposits in bank at the time of the closing, had been made subsequent to June 25, 1930, it was not necessary for the court to express any opinion as to whether a lien had existed from the time of

the original deposits up to the date of the passage of the amendment, and this question the court reserved. But it is significant to note the recognition by the Court of the fact that the transaction between the parties was not completed with the giving of the original bond, but that it was contemplated that there would be continuous dealings between the parties so long as balances should remain on deposit. It is significant also to note that, though the deposits in question were made subsequent to June 25, 1930, the Court held that the lien was entitled to priority "from the date of the Act." This was held, although the Court recognized the fact that no lien arose in 1928, when the bond which was the condition precedent to any lien, was first given. Indeed, we feel that, reading the case as a whole and bearing in mind the purpose of the amendment which, in the Supreme Court's language, "was to equalize the position of national and state banks," the Court considered and treated the amendment as curative in its effect, at least so far as the intention of the parties could be given effect to, without creating retroactive preferences. As we shall later consider this decision separately, we make no further reference to it at this time.

In *Kavanaugh v. Fash, supra,* 74 F. (2d) 435, the Circuit Court of Appeals for the Tenth Circuit held effective a pledge of securities by a national bank, even though not authorized by resolution of its Board of Directors, as required by the Oklahoma statute. It pointed out that the amendment of June 25, 1930, was not procedural and did not affect the manner in which indemnity should be effected. The Court also observed:

> "Furthermore, the enabling act vitalized a previously made pledge with respect to money deposited after it became effective."

In *Fidelity & Deposit Company v. Kokrda, supra,* 66 F. (2d) 641, a national bank gave security for public deposits. The Court held that contracts to secure such deposits made in good faith, *should be sustained,* although not entered into in exact accord with the statutory requirements. The Court said:

> "Furthermore, the bank has not returned the deposit. When it received the deposit, it was its duty to secure the same in the manner provided in the statute. Under such circumstances, it ought not to be permitted to recover the security without returning the deposit."

This duty pertaining to *receipt of deposits,* should apply with equal force to the *retention of deposits* from and after June 25, 1930. If the bank wished to retain the deposits involved in the instant case, it was under a duty to secure them, and, having left Respondents in possession of the collateral, thinking they were secured, should not now be entitled to contend that security was not had.

In *Haynes v. City of Woodward, supra,* 6 F. Supp. 270, bonds were pledged to secure deposits of public funds. Both the pledge and the deposit were made prior to the amendment of June 25, 1930. Subsequent to the amendment, some of the bonds so pledged were returned and other bonds substituted, but some of the bonds continued in the possession of the State Treasurer and were, by the conduct of the bank and the Treasurer, treated as a pledge to secure said deposit. The Court said:

"It is true that originally the bonds were given by the bank to the treasurer of the city of Woodward to secure the deposit prior to June 25, 1930, the date on which the federal law was enacted. However, the Woodward bonds amounting to $28,000 were continued in the possession of the treasurer of the city of Woodward, after the enactment of the law herein set out of June 25, 1930, and, by the acts and conduct of both the city treasurer and of the bank *subsequent to June 25, 1930, were* treated as a pledge to the city to secure said deposit.

"However, the conduct of the bank at all times subsequent to June 25, 1930, approving the pledge to the city of Woodward, in the judgment of the Court, would have the same effect as if said entire pledge had been made subsequent to June 25, 1930."

We submit that on and after June 25, 1930, in the instant case, the silence of the bank, under the circumstances disclosed, when under a duty to act and disclaim, is the equivalent of affirmative approval. Conduct on the part of the bank, approving a previously given pledge, such as that demonstrated in the instant case and in the case last cited, if present in the case of *Thompson, Receiver, v. Twin Falls Highway District,* 17 F. Supp. 705, cited at page 9 of Petitioner's brief, was entirely overlooked by that district Court in rendering its decision.

C. State banks in Florida could give security for deposits of such funds as are involved.

State banks in Florida have at all times been authorized and, in effect required, by the legislatively declared

public policy of the State of Florida, to give security out of their assets for deposits of public funds of the kind herein involved. In the instant case the deposits in question were of interest and sinking funds of Taylor County road and bridge bonded indebtedness, such funds resulting from taxation and, of course, being public funds.

That such state banks were at all times authorized to give such security, see the following cases:

First American Bank & Trust Co. v. Palm Beach, 96 Fla. 247, 117 So. 900, 65 A. L. R. 1398;

Davis v. Knott, 109 Fla. 60, 147 So. 276.

Such authority is conceded at page 3 of Petitioner's brief.

D. The implications, if not the holding, of the Lewis case strongly support and are in harmony with the rulings of the lower Courts.

(1) *In many respects the Lewis case went even farther than it was necessary to go in this case:*

a. The bond required of national banks was double that required of state banks; and, since the lien was security for the bond, it was argued unsuccessfully that it should be invalid as being in double the amount of the deposits, and, therefore, no lien at all, but in reality a preference.

b. The lien allowed to be enforced was a general one and was not limited to specific assets of the bank.

c. The lien attached not only to the assets on hand with the bank at the time of making deposits, but also

reached after-acquired assets of the bank, including those captured upon insolvency by the receivership.

d. The lien was allowed, although it was in form security for the bond, and not for the deposits made.

e. The right allowed to be asserted was a right against assets of the bank in the hands of the receiver; and not as here as against assets in the hands of public authorities, or held segregated by the bank under trust receipt, to be released to the bank only with the consent of the public authorities. It was allowed as against the assets captured by the receivership upon the theory that those assets only belong to the bank, the creditors, and the receiver, which come to the receiver unimpressed with the rights of others acquired prior to, and not in contemplation of, insolvency.

f. The right which was allowed to be asserted was a right arising by way of assignment and subrogation after the surety on the bond had paid the public authorities and had taken an assignment of their rights which it was asserting in the action.

(2) *In almost all respects the two cases are strikingly similar:*

a. In both the cases, the lien was contractual and does not arise *proprio vigore* from any statute.

b. In each of the cases the original agreement of the parties could not, at the time first entered into, be given effect, solely because of the obstacle of the paramount federal law.

c. The lien in the *Lewis* case could not arise except upon the giving of the bond; yet the only bond given

was in 1928. The Court held that it was not necessary to go through the form of executing a new bond. In the instant case it seems similarly unnecessary to have gone through the form of withdrawing the deposit and redepositing it after June 25, 1930. In the instant case, as in that, the obstacle to giving effect to the intention of the parties was removed by the amendment, which provided that security might be given upon the deposit of public funds. If in the *Lewis* case the lien could arise only upon giving of bond, and that was thought not necessary to be given again, the inference is clear that after the passage of the amendment, it was equally unnecessary, in the instant case, to uselessly proceed to withdraw deposits, redeposit them and redeliver all of the securities, when the intention of the parties at all times to give security was clear, and both the securities and deposits were respectively retained by the respective parties at a time when the federal law authorized, and the state law in effect required, security to be given for such deposits.

d. In neither of the cases was it necessary to resort to a retroactive construction of the statute, for the reason that insolvency in neither case occurred until after June 25, 1930; and, therefore, no rights in favor of third parties having in the meantime vested, the intention of the parties could be given effect as to the future; that is, from and after June 25, 1930. It is noteworthy that in the *Lewis* case, although all of the moneys in question had been deposited after the amendment, the lien was allowed priority *from the date of the amendment.*

e. In neither case was the relationship between the parties a closed transaction with the making of the

original deposits; for in both instances it was contemplated that there would be continuous dealings between the parties so long as, and to the extent that, balances should remain on deposit with the bank, the lien in each case to be measured by the unpaid balance of deposits from time to time on hand with the bank.

f. In each case there was a continuing intention that security exist; and in each case the Court gave effect to the intention as soon as that could be done consistent with the paramount federal law.

(3) *The only discernible distinction in the cases, wherein in the instant case could be argued to be weaker, is that in the Lewis case the deposits were made after, and in the instant case before, the amendment. This is a distinction without a difference.*

a. It is true that in the *Lewis* case the court reserved the question and did not decide whether the lien was operative as to deposits made before the amendment. It must be remembered however, in reading what was said by the court in this connection, that the only deposits involved were made after the amendment. Others had been made before then. It results, therefore, we believe, that when the Court said it had no occasion to decide whether the lien was operative also with respect to deposits made before the amendment, all that was meant was that there was no occasion to decide whether, when the obstacle to giving effect to the intention of the parties was removed by the amendment, the effect was to validate the lien from the time of the giving of the original bond and not merely from the time of the amendment. This conclusion, it seems to us, is fortified when it is borne in mind that in the factual

situation involved, the only deposits made before the amendment did not remain on deposit after it, and it was of these deposits that the Court was speaking. The question reserved was whether the amendment should be construed *retroactively* to validate a lien which concededly had not existed prior to the effective date of the amendment. Certainly the opinion contains no suggestion, and it is absurd to contend, that a statute may not operate *in praesenti,* as well as *in futuro,* without becoming subject to the rule that statutes are to be construed as retroactive only when that clearly appears to be their purpose.

b. In view of the authorities cited by the Court in the *Lewis* case, and in particular in view of the case of *Ewell v. Daggs,* 108 U. S. 143, 27 L. Ed. 682, which was cited by the Supreme Court with approval; and having in mind what the Court said with reference to the necessity of going through the form of executing a new bond, it seems to us to be placing a strained construction on the *Lewis* case to suggest that it would have made any difference whether the deposits were made before or after the amendment, so long as unpaid balances thereof remained with the bank subsequent to the amendment and so long as insolvency of the bank had not in the meantime supervened.

c. It may be remarked in passing that the Supreme Court by no means indicated that the statute was not intended to have a retroactive construction and to apply to transactions occurring prior to the amendment. It simply reserved the question. Such a construction is not necessary in this case; but if the purpose of the amendment was, as this Court said it was, to equalize the

position of national and state banks, such construction is highly plausible. Thus, in this case, retroactive construction would have been necessary if it were contended that there was, prior to June 25, 1930, any lien on the securities pledged. In view of the fact that insolvency did not occur until after June 25, 1930, this question was not necessary to be decided and is academic.

E. Conclusion as to the First Point

(1) *None of the authorities are in conflict with the result reached by the lower courts.*

a. As pointed out, there is a vast difference between those cases in which no new authority was granted by the amendment, and those where new authority was granted; principally because in the first class no effect could be given the intention of the parties without violating the paramount provisions of federal law and allowing the parties, by indirection, to do that which could not directly be done.

b. In cases where new authority was granted, the situation where insolvency supervenes before the amendment is different from that in which it does not; this is so because in the former case retroactive construction is called for; in the latter, not.

c. Analysis of those cases at all in point has developed that none are contrary to the result reached by the District Court and the Circuit Court of Appeals.

(2) *All of the pertinent authorities support the result.*

In discussing those cases dealing with situations in which the amendment conferred new authority, and in

particular those cases which have dealt with situations in which insolvency supervened only after the effective date of the amendment, we have pointed out, and it is almost unnecessary here to reiterate, that some of the cases directly, and others by strong implication, support the conclusions reached by the lower courts.

SECOND POINT

THE RULINGS OF THE COURTS BELOW DO EQUITY BETWEEN THE PARTIES, INVOLVE NO INFRACTION OF THE ULTRA VIRES RULE, AND SHOULD BE SUSTAINED

A. The justice of the situation should appeal strongly to the conscience of a Court of Equity.

(1) *Respondents were misled by the prior administrative rulings of Comptrollers of the Currency of the United States.*

For many years the various Comptrollers of the Currency of the United States had uniformly disapproved and refused to allow pledges by national banks of their assets as security for private deposits. For a like period of time they had as uniformly approved and allowed, in states where other banks enjoyed such privileges, national banks to pledge their assets to secure deposits of public funds of states or their political subdivisions. All parties assumed that the pledges might be made and would be effective; they acted accordingly.

On this basis, and his basis alone, it was that at the beginning of the relationship of the parties, public interest and sinking funds of the county involved were

deposited and security, as it was thought, taken for such deposits.

(2) *Respondents acted in entire good faith; and it is not even inferred that anything was done with any intent to defraud, or in contemplation of insolvency.*

The bill of complaint contains not the faintest suggestion but that Respondents acted in the utmost good faith. No allegation regarding the original deposits and the original delivery of the securities conveys any idea that there was, or was contemplated, anything in the nature of a transfer of assets of the bank in contemplation of insolvency. The liens were to exist for the safekeeping and prompt payment of the moneys then deposited, or thereafter to be deposited; they were not limited in their incidence to the event of insolvency of the bank. It becomes plain with what good faith the dealings were had, and with what honesty the whole transaction was conducted from its beginning until after the appointment of the receiver, for we find him (and inferentially with the approval and after the advice of the then Comptroller of the Currency) carrying out the intention of the parties by recognizing Respondents as secured creditors and so treating them.

(3) *Respondents were misled and lulled into security by the conduct of the bank subsequent to the amendment.*

Whatever might be said of the original authority of the bank before the Act of 1930 to pledge its assets as security for such deposits as are here involved, it is apparent that full authority was enjoyed by the bank from and after June 25, 1930. In this situation, Respondents were continued in the possession, either actual or constructive, of the securities intended to be pledged,

and were allowed to think that they were secured. It is true that the bank took no affirmative action, so far as it appears from the bill of complaint, one way or the other, after the passage of the amendment. It cannot be ignored, however, that the situation was such that if the bank did not wish its assets to be treated as pledged to secure balances thereafter remaining on deposit, there was in equity and all good conscience a duty upon it to so advise the Respondents, in order that the deposits might be withdrawn. This is so because of the fact that Respondents were continued in the possession of such assets and, on the strength thereof, allowed the bank to retain the unpaid balances of the deposits at a time when the federal law authorized, and the state law in effect required, security to be given. Surely under such circumstances, the conduct of the bank is equivalent to affirmative action insofar as the retained balances and *security therefor are concerned*. Public officials are presumed, absent a showing to the contrary, to perform the duties cast upon them by the law. The lower Court refused to indulge in a harsh presumption that had the bank attempted to reclaim the security, the deposits would have been left with the bank when the Respondent state treasurer was required by a legislatively declared public policy to exact security for moneys deposited by him. Certainly this action on the part of the lower Court should appeal to the conscience of this Court, particularly in view of the fact that this Court, both in the *Lewis* case, and in the case of *Pottorff v. El Pasco-Hudspeth Counties Road District*, 62 F. (2d) 498, ceritorari den., 289 U. S. 724, 77 L. Ed. 1474, 53 S. Ct. 522, upheld the power of national banks to pledge their assets as security for deposits of public funds of states or their political subdivisions.

(4) *Respondents in this case are fiduciaries themselves.*

It cannot be ignored, in dealing with the case, that the moneys left on deposit with the bank after the amendment, and which remained on deposit until the closing of the bank, were trust funds. They constituted the proceeds of the exercise of the power of taxation and were public funds in the fullest sense of the word. We feel that this Court will realize the equities of the situation and consider, as did the Court in the case of *Haynes v. U. S. F. & Co.*, (D. C. W. D. Okla.), (2-19-34), 6 F. Supp. 272, that:

> "The laws governing the operation and management of banks ought not to be construed to show a greater solicitude for the protection of general depositors in a bank than in the protection of trust funds . . . deposited with the bank, which in fact are the funds of the taxpayers, assessed and collected for a public purpose. . . ."

B. The relationship of Respondents and the bank was a continuing one, with the intention implicit that the assets delivered stand as security for unpaid balances of deposits so long as they should remain with the bank.

(1) *It is fallacious to contend that the relationship of the parties ended with the original deposits.*

When the original deposits were made it was never contemplated between the parties that the relationship of the public officials to the bank should cease with such deposits. Indeed, the very form of the transaction, of

which the deposit was only the beginning, shows very clearly that it was contemplated that there would be continuous dealings between those parties so long as, and to the extent that, the public funds should remain on deposit with the bank. The liens were intended not merely as security for the original deposits, but as the exhibits themselves show, were intended also as security for *unpaid balances* from time to time remaining on deposit with the bank. Nothing can be clearer than that it was contemplated that from time to time withdrawals would be made and new deposits credited to the accounts; nor can anything be more manifest than that there was a continued and continuous intention of the parties that the assets stand as security for unpaid balances remaining with the bank, and that those assets should stand as security only to the extent of such unpaid balances. Thus the lien contemplated was a lien of changing content and, by no stretch of the imagination, can it be successfully maintained that what was done was a closed transaction at the time of the original deposits, and to be governed merely by the laws as they then existed.

(2) *Implicit in the dealings was the intention to give security so far as it could be given consistent with the paramount federal law.*

We did not contend in the lower Court, and it is not necessary for us here to contend, that by virtue of the amendment of 1930 a lien was validated from the date of the original deposits to the date of the amendment; but we did contend in the lower Court, and we here contend, that a fair consideration of the circumstances will disclose that there was a continued intention, on the part of the bank, to give security insofar as that se-

curity could be given consistent with paramount requirements of the federal law. It may be, as counsel for Petitioner so earnestly contends, that no security existed prior to the effective date of the amendment. It may be that under the law no effect could be given to the intention of the parties insofar as that intent conflicts with the federal law. But neither in the bill of complaint nor in any cited case is it shown that under such circumstances as are here involved, effect cannot be given to the intention of the parties, when that intention is a continuing one and when, in part, it is consistent with the federal law and consistent also with the laws of the state which govern, and are applicable to, national banks, so far as such state law does not conflict with federal law enacted for their government. To say that effect cannot be given to the intention of the parties, when that intent conflicts with federal law, is one thing; to say that when the intention is continuing, effect cannot be given to *it when consistent* with both the federal and the state law, is quite another. The lower courts refused to entertain any such inequitable view as would be involved in the latter assertion. They found ample room to distinguish between the portion of the transaction (and by the transaction we mean the continuous relationship of the parties from the time of the original deposits to and including the appointment of the receiver) which unwittingly attempted to contravene federal law, and that portion which involved no such contravention. They realized that in this case, as in the *Lewis* case, it was competent for the bank to accept appointment as a public depository; they were cognizant of the fact that the relationship of the parties was a continuing one; and they were sensible of the in-

justice involved in allowing a cancellation of any lien to the extent of unpaid balances remaining after June 25th under such circumstances as that it was apparent that Respondents could not be restored to their original situation.

C. - Sustaining that portion of the agreement of the parties which was consistent with the federal law involved no infraction of the ultra vires rule.

(1) *A consideration of the ultra vires rule shows that it is based on three grounds, no one of which is here applicable.*

It has been recognized in decisions of this Court, in many cases, that the doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its powers, is void, rests upon three grounds, and three grounds alone:

a. The obligation of one contracting with a corporation to take notice of the legal limits of its powers.

b. The interest of the stockholders not to be subject to risks not undertaken.

c. The interest of the public that the corporation not transcend powers conferred on it by law.

It would be mere pedantry to recite all of the decisions in which this has been recognized. We do cite one:

McCormick v. Market Bank,
165 U. S. 538, 549, 41 L. Ed. 817.

As to any attempt to assert the existence of a lien prior to June 25, 1930, these reasons might be applicable in the instant case; but as to any lien for unpaid bal-

ances remaining on deposit after that date, the reasons do not exist. This is so because both federal and state law then coincided to allow such pledges. If Respondents were on notice of the lack of corporate power at the time of the original appointment of the depository, it follows with equal force that the depository was on notice on June 25, 1930, that it did have the power; and there being a continuing intention and a continuing relationship between the depository and defendants, it was on notice equally that it was inequitable for it to retain the deposit, leaving defendants in possession of collateral, thinking themselves secured, when it must have realized that any attempt to reclaim the collateral would have resulted as surely in a withdrawal of the deposits. *If the reason for a rule fails,* the rule also fails, as applied to a particular case.

(2) *The doctrine of ultra vires is not favored in the law.*

As illustrative of the position that the doctrine of *ultra vires* occupies in our law, we quote the following from a decision of the Supreme Court of the United States:

> " . . . The doctrine of *ultra vires,* whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided. . . ."
>
> *San Antonio v. Mehaffy,*
> 96 U. S. 312, 315, 24 L. Ed. 816.

(3) *The presumption is that corporations contract within their powers.*

We submit that when a contract of a corporation is not in its entirety beyond the scope of the power of a corporation, it will in the absence of proof to the contrary, be presumed to be valid, for the rule is that corporations are presumed to contract within their powers.

Ohio & M. R. Co. v. McCarthy,
96 U. S. 258, 24 L. Ed. 693.

Thus in this case, though one of the incidents of the relationship of the parties, namely, the existence of a lien prior to June 25, 1930, might have been beyond the corporate power; it does not follow that another incident of such relationship, that is, the existence of a lien as to unpaid balances after June 25, 1930, is likewise beyond the corporate power.

(4) *As far as the doctrine of ultra vires is concerned, each case must be judged on its own particular facts.*

We have thoroughly and carefully considered all of the decisions of the Supreme Court of the United States which we have been able to find, dealing with the doctrine of *ultra vires* as applied to corporate acts. We believe that it is enough for us to remind the Court of the fact that corporations have been held liable for crimes and torts which certainly were beyond the corporate authority granted. They have been held liable for contracts made on their behalf by promoters, though at the time of these contracts, the corporation, by hypothesis, was not in existence and had no power at all. By construction, in numbers of cases and in the face of statutory statements that such acts if done, would be *void,* the courts have held, where equity called for such a holding that such corporate action, even in the face of a prohibition, might be binding upon the corporation.

We are inclined to feel, with Mr. Morawetz, that each case is to be judged with reference to its particular circumstances and that the legal enforceability of agreements is purely a question of positive law. In fine, we feel, after a full reading of this Court's decisions dealing with the question, that *ultra vires* contracts of corporations must be treated as binding or not binding, or to be followed by *other* legal consequences according to the purpose and meaning of the prohibition against such action to be found in the law. In support of this view, we feel that it should be borne in mind that this Court has frequently held that the invalidity of a contract made by a corporation in excess of its chartered powers, may be cured by a subsequent act of the legislature, and that the contract is by such subsequent act, made as valid as if it had been originally authorized. This clearly demonstrates that the want of legislative authority to *enter into* a contract affects the remedy merely and does not affect the existence of the contract itself. This would seem to follow because of the fact that the legislature would have no power to create a contract between the parties where there had been none before. That such vitality can be breathed into an originally *ultra vires* contract, see the cases of

Gross v. U. S. Mortgage Co.,
108 U. S. 477, 488, 27 L. Ed. 795, 798;

West Side Belt R. R. Co. v. Pittsburg Construction Co.,
219 U. S. 92, 55 L. Ed. 107;

Charlotte Harbor & N. R. Co. v. Wells,
260 U. S. 8, 67 L. Ed. 100.

We cite these cases merely to show that the question in reality involved is one affecting the remedy, and not the substantial question of whether there was any contract at all, for it is not necessary, as we have pointed out, for us to contend that the act in the instant case was effecive retroactively to validate liens which had not existed prior to its passage. We feel, and we strongly urge upon the Court, the view that as any prohibition against securing public deposits by national banks was based upon grounds of public policy alone, it is but reasonable that the effect of the prohibition upon the legal validity of corporate acts should be determined by the requirements of that public policy. From and after June 25, 1930, the public policy was clear; and certainly to hold the lien existed from and after that date with respect to unpaid balances, does not contravene it.

D. When the obstacle was removed by the amendment, the original agreement could as to the future, be given the effect intended by the parties.

We submit that in this case, as in the *Lewis* case, the removal of the original obstacle by the amendment of 1930 permitted the original agreement thereafter to be given the effect intended by the parties, and that a lien became operative upon the pledged assets to the extent of the unpaid balances of deposits thereafter remaining with the bank.

Lewis v. Fidelity & Deposit Co., supra.

See *Cox v. Hart,*

260 U. S. 427, 435, 67 L. Ed. 332, 337;

Ewell v. Daggs,

108 U. S. 143, 27 L. Ed. 682.

In the case of *Ewell v. Daggs, supra,* text 148, this Court said:

> "It is claimed by the appellant that, notwithstanding this repeal of the usury laws, the rights of the parties are to be determined according to the law in force at the time the transaction took place; that by the terms of that law the contract . . . was void as to the entire interest reserved and paid; that no subsequent law could make valid a contract originally void . . .
>
> "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect.' . . .
>
> "All that can be meant by the term, *according to any legal usage,* is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land . . ."

The Court, in the last case cited, recognized that there was a distinction between acts bad in themselves and those which are bad because prohibited. It further recognized that the repeal of usury laws without a saving clause, cut off the defense as to the future and that such repeal could have such operation against all objections that the repeal deprived parties of vested rights or impaired the obligation of their contracts. In commenting upon this the Court went on to say, text 151:

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, so long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this Court. . . .

"The right which the curative or repealing act takes away in such a case, is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

E. Independent of the original pledge agreement, the lien can be sustained on equitable principles.

We submit that, quite apart and separate from the original delivery of the assets as collateral, the right

of the Respondents to assert a lien as to unpaid balances remaining with the bank after June 25, 1930, can be sustained on equitable principles.

We have pointed out that it was not beyond the power of the bank to accept appointment as a depository. Certainly, therefore, when it left the Respondents in the possession, actual or constructive, of the securities and retained the balance after June 25, 1930, it did so under such circumstances as that good faith required security to be given.

Leaving out all that portion of the transaction which had occurred prior to the passage of the amendment, except the appointment of the bank as depository, which concededly was valid, the situation then was that Respondents were required by a legislatively declared public policy of the State of Florida to exact security for deposits of public funds. It cannot be doubted that this duty was a continuing one.

Moreover, it is settled that a national bank is subject to state law unless that law interferes with the purposes of its creation or destroys its efficiency, or is in conflict with some paramount federal law.

Lewis v. Fidelity & Deposit Co., supra,
292, U. S, 559, 566, 78 L. Ed. 1425, 1431.

Thus when the bank was authorized by federal law to give security, the paramount obstacle was removed, and it then became the duty of the bank to secure deposits as required by the legislatively declared public policy of the state, or to return the deposits.

See *Fidelity & Deposit Co. v. Kokrda, supra,*
(C. C. A. 10), 66 F. (2d) 641.

The factual situation was such at that time that there is ample basis for implying the existence of a new contract, if it should be held that the original agreement of the parties could not in any wise, even as to the future, be given effect.

It was not necessary to go through the form of withdrawing the deposits and redepositing them and of redelivering the securities.

Lewis v. Fidelity & Deposit Co., supra.

Certainly it cannot be maintained that if this form had been followed, there would have been, having in view the allegations of the bill of complaint, any conduct to which general depositors of the bank could have objected.

Lewis v. Fidelity & Deposit Co., supra.

If there was any question as to the manner in which the securities were held segregated by the bank, all doubts on that score are removed by a consideration of the following cases:

Clark v. Iselin,
21 Wall. 360, 22 L. Ed. 568;

Burrowes v. Nimocks,
(C. C. A. 4), 35 F. (2d) 152;

Sexton v. Kessler,
225 U. S. 90, 56 L. Ed. 995;

Capital Savings & Loan Ass'n v. Olympia Nat'l Bank,
(C. C. A. 9), 80 F. (2d) 561.

Under the circumstances, Respondents had certainly acquired rights prior to the insolvency of the bank. It

is recognized by many cases that a receiver of a national bank takes the assets of the insolvent national bank subject to claims and defenses which might have been interposed as against the insolvent corporation; and that liens, equities, or rights arising by express agreement or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated.

Scott v. Armstrong,
146 U. S. 499, 36 L. Ed. 1059;

Merrill v. National Bank of Jacksonville,
173 U. S. 1431, 43 L. Ed. 645.

If, therefore, any right, lien, or equity arose in the instant case, intermedite the passage of the amendment and the insolvency of the bank and the appointment of its receiver, that right does not operate illegally *to prefer Respondents over general depositors. For,* as was said in the case of *Scott v. Armstrong, supra*:

> ". . . The requirement as to ratable dividends is to make them from what belongs to the bank; and that which at the time of the insolvency belongs of right to the debtor, does not belong to the bank".

As pointed out by the opinion of the Circuit Court of Appeals in the instant case (R. 56):

> "When the purpose of the statute is considered in the light of the long continued practice of National banks, known to and recognized by the Comptroller, of giving security for public deposits, and the desire of Congress to authorize

this practice, it would, we think, be an unreasonable construction of the Act to hold that Congress intended by it to provide that, in order to be valid, all existing arrangements for security must be cancelled out and new ones entered upon. We think the contrary intent manifest. We know from the history of the Act that its purpose, we think its effect, was to fully enable national banks to compete with state banks. We think that from and after its passage, as to all public funds on deposit in national banks in states where state banks could give security, whether deposited before or after the passage of the Act, arrangements made before its passage for their security, equally those made afterward, are valid."

If there be any force or virtue to the oft-repeated statements that he who seeks equity must do equity; that equity considers as done that which ought to be done; and that equity looks through the form and regards the substance of a transaction, then the instant situation is one in which there was a crying need for their application.

It must be remembered that this is a suit for cancellation and rescission by a fiduciary against fiduciaries; by a trustee against trustees; and in a situation in which the trustee suing is suing for that which in equity did not belong, and should not belong, to the bank under the circumstances; whereas relief was sought against the fiduciary Respondents, which would inevitably, if granted, cause a proportionate loss of trust funds committed to the care of the Respondents who acted in good

faith in all of the transactions regarding the security involved. Certainly the decisions of the lower courts were equitable, just, and should be sustained.

THIRD POINT

THE AUTHORITIES CITED BY PETITIONER ARE NEITHER PERSUASIVE NOR CONTROLLING IN THE INSTANT SITUATION

1. The entire brief in its argument as to preference, assumes that the rights of the creditors became fixed before the date of the closing of the bank; the entire argument for rescission is predicated upon the mistaken assumption that no liens were held by defendants. There being no suggestion as to any transaction in contemplation of insolvency, such argument begs the real question; namely, as to whether security was held.

2. *The brief entirely overlooks the fact that the relationship of the parties was not closed with the original deposit and that such deposit did not constitute a closed transaction.* It fails to consider the fact that the intention of the parties to give security and their relationship were continuing and continuous.

3. It ignores the fact that if any portion of the agreements of the parties was *ultra vires,* that part is separable and distinct from the portion which was not *ultra vires,* by reason of the amendment of 1930.

4. It persistently insists that Respondents contend for a retrospective construction of the statute; whereas such retrospective construction is not contended for; nor was it necessary to reach the result arrived at by the lower Courts. As pointed out by this Court, in the *Lewis* case,

a statute is not retrospective or retroactive in its operation simply because it draws upon antecedent facts.

5. We turn now to a more detailed consideration of the Petitioner's brief; but we shall not attempt in this brief to analyze all of the cases cited. Many of them have been sufficiently distinguished by what we have hitherto said; in others the distinction will be apparent to the Court upon a reading and consideration of them.

a. In view of the receipt, (R. 19) the statement on page 3 of Petitioner's brief, that *certain* collateral remained in the physical possession of the bank, is not strictly correct. The receipt shows a *conditional* delivery of certain collateral to the bank, to be by it held in trust and segregated. Respondents still held constructive possession and the right to actual possession.

Clark v. Iselin,
21 Wall. 360, 22 L. Ed. 568.

b. In answer to what appears at pages 7 and 12, it may be said that the *Sneeden* case involved a situation in which at no time could the intent of the parties be given effect without allowing indirectly what could still not be done directly.

c. At page 15, in answer to the method of construction urged, we reiterate that no retrospective construction was necessary; that the transactions were not closed with the original deposits. On the one hand, Petitioner maintains that the deposit might be retained, thus swelling the liquid assets of the bank; and on the other, that even after banks could give security, he should be allowed to recapture it and thus further swell the assets of the bank beyond the amount to which the creditors should in equity be entitled to look.

d. At page 17 we may observe that a statute does not operate retrospectively because it is applied to an existing situation. This also is a case of prospective operation. The Act, it may be observed, brought into existence no new obligation. It simply removed an obstacle to the enforcement of the intention of the parties as to the future. Whose vested rights were impaired? At page 12 the argument as to ratification is a fallacy. It is fundamental that ratification involves a relation back; that giving effect to the intent of the parties *in praesenti* and *in futuro* does not. Again we find the mistaken idea that the relationship of the parties was a closed transaction with the original deposit. The cases cited at pages 12 *et seq.*, dealing with illegal contracts, are not in point, first because of the continuing character of the relationship in the instant case and, secondly, because it was there sought to give retroactive effect to the later laws and thus make the original closed transaction valid from the beginning. We may recognize that the mere passage of a law might not have validated the transaction in those cases from the beginning, and still recognize that considering the act, the situation of the parties, and all the circumstances, it is equitable to give effect to the intent of the parties as to the future. Incidentally, much of what was argued in these cases was repudiated in the case of *Ewell v. Daggs, supra,* which was cited with approval in the *Lewis* case. All of the cases dealing with *ultra vires* transactions involved situations in which, at the time that it was attempted later to assert their validity, the type of action involved was still *ultra vires.*

CONCLUSION

The action of the District Court in dismissing the bill of complaint, under the circumstances disclosed by the record, which was affirmed by the Circuit Court of Appeals, is, we submit, action which has regard for the ideals of honesty and fair dealing, whether by governmental or private parties; which gives effect to substance rather than to form; and which applies the tests of conscience and fair dealing, so that any claim of the bank for a rescission must yield before the apparent equities of the Respondents. In short, we feel, as did the lower Courts, that equitable principles should not be sacrificed upon the altar of tenuous distinctions. The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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